IN THE
SUPREME COURT OF THE UNITED STATES
Fall Term, 1972

No. 72-1850

ROBERT E. PORTH,
Petitioner,

v.

WARDEN OF THE STATE PENITENTIARY
OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, WARDEN OF THE STATE PENITENTIARY OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is an unreported memorandum decision filed January 24, 1973, styled ROBERT E. PORTH v. WARDEN OF THE STATE PENITENTIARY OF THE STATE OF NORTH CAROLINA, No. 72-1012, which affirmed the memorandum opinion and order of United States District Court for the Middle District of North Carolina, Greensboro Division, filed October 21, 1971. A petition to rehear was denied by order of the Court filed March 5, 1973.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C.A., 1257(3).

INDEX

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT . . . . . .

I. PETITIONER RECEIVED ADEQUATE REVIEW VIA A PERMISSIBLE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE 4th CIRCUIT 5

II. PETITIONER'S TRIAL WAS NOT AFFECTED BY PRETRIAL PUBLICITY SO AS TO HAVE PREVENTED HIM FROM RECEIVING A FAIR TRIAL 6

III. EVIDENCE AGAINST PETITIONER WAS NOT PROCURED BY DURESS, AND PETITIONER'S SHOWING IN THIS REGARD IS INSUFFICIENT TO MERIT HIM RELIEF IN A FEDERAL HABEAS CORPUS PROCEEDING 17

IV. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER 19

V. PETITIONER WAS NOT REQUIRED TO UNCONSTITUTIONALLY ASSUME THE BURDEN OF PROOF 21

VI. PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS WAS PROPERLY REVIEWED 22

CONCLUSION 22

CERTIFICATE OF SERVICE 24

APPENDIX I 25

APPENDIX II 27

TABLE OF AUTHORITIES

Fay v. Noia,
372 U.S. 391 (1963) 17, 22

Garrison v. Patterson,
391 U.S. 464 (1968) 5

Grundler v. North Carolina,
283 F. 2d 798 (4th Cir. 1960) 21

Johnson v. Zerbst,
304 U.S. 458 (1937) 17

Sidders v. United States,
381 F. 2d 513 (9th Cir. 1967) 21

State v. Faust,
254 N.C. 101, 118 S.E. 2d 769 20

State v. McClain,
240 N.C. 171, 81 S.E. 2d 364 20

Stroble v. California,
343 U.S. 181 (1952) 17

Townsend v. Sain,
377 U.S. 293 (1963) 22

United States v. Milanovich,
303 F. 2d 626 (4th Cir. 1962) 17

United States v. Shipp,
409 F. 2d 33 (4th Cir. 1969) 18

Virgin Islands v. Lake,
362 F. 2d 770 (3rd Cir. 1966) 21

Virgin Islands v. Torres,
161 F. Supp. 699 (DC VI 1958) 21

QUESTIONS PRESENTED

I.

DID PETITIONER RECEIVE AN ADEQUATE AND PROPER APPELLATE REVIEW IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT?

II.

WAS PETITIONER'S CRIME THE SUBJECT OF SUCH PRETRIAL PUBLICITY THAT HE COULD NOT HAVE RECEIVED A FAIR TRIAL?

III.

WAS TESTIMONY AGAINST PETITIONER UNCONSTITUTIONALLY OBTAINED BY DURESS?

IV.

WAS PETITIONER DENIED DUE PROCESS BY TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER?

V.

IS PETITIONER ENTITLED TO A HEARING DE NOVO ON HIS POST-CONVICTION CLAIMS IN FEDERAL COURT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION, AMENDMENT XIV

No state shall . . . deprive any person of life, liberty, or property, without due process of law;

28 U.S.C. §2253. *Appeal.*

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. §2254. *State Custody; remedies in federal courts.*

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

STATEMENT OF THE CASE

Petitioner was tried for and convicted of murder in the first degree in the Superior Court of Forsyth County, North Carolina, in February 1966. His conviction was affirmed on appeal to the

North Carolina Supreme Court, *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967). Thereafter, on August 12, 1969, he filed an application for a post-conviction hearing in the Superior Court above, which hearing was held on February 23 and 24, 1970. Relief was denied in a 21 page order filed March 9, 1970. The North Carolina Court of Appeals denied certiorari on June 5, 1970. On December 31, 1970, petitioner applied for a writ of habeas corpus from the United States District Court for the Middle District of North Carolina, which was denied by order of October 26, 1971. It is this latest order petitioner seeks by this application to overturn.

ARGUMENT I

PETITIONER RECEIVED ADEQUATE REVIEW VIA A PERMISSIBLE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE 4th CIRCUIT.

Petitioner first contends that the summary dismissal of his appeal was improper, that he was not given "proper and adequate review" and that a determination on the merits was not made. All are untrue.

First, petitioner received appellate review and a determination on the merits. In the initial order of the United States Court of Appeals for the Fourth Circuit (Application for Cert., p. A9), the first sentence reads "A review of the record and of the district court's opinion discloses that an appeal . . . would be without merit." From this, it is obvious petitioner received both factual and substantial legal review, as the record includes his arguments. It is true that petitioner did not have an oral argument or a formal brief submitted on his behalf, but appellate review, while normally comprehending these, does not require them.

Secondly, this was entirely proper. This Honorable Court has approved the use of a summary procedure, if appellant is notified of it, *Garrison v. Patterson*, 391 U.S. 464 (1968). In the present case, petitioner was notified by form letter dated January 6, 1972 that he might file a statement arguing his contentions within a period of the 20 days next following and that thereafter the Court might either (1) "Summarily dismiss the appeal . . ." or (2) "dispose of

the appeal upon briefs or oral argument." (Respondent's Appendix I) Accordingly, the Court below met the *Patterson* requirements, and certiorari shoud not issue to review this matter.

ARGUMENT II

PETITIONER'S TRIAL WAS NOT AFFECTED BY PRETRIAL PUBLICITY SO AS TO HAVE PREVENTED HIM FROM RECEIVING A FAIR TRIAL.

Petitioner next contends in view of certain "prejudicial pretrial publicity" the trial judge "did not exercise care sufficient to protect (his) constitutional right to a fair and impartial trial." He asserts (a) there was continuous publicity and he was denied a change of venue (App. p. 12); (b) reference was made in the news to the unusual circumstances of his wife's death; attempts to hold him responsible for her death and his daughter's death occurred; these could not be placed in evidence against him yet some were (App. p. 15); (c) the publicity was inflammatory and prejudicial because it sensationalized his wife's death, insinuated he was responsible for the death of his daughter, and it continually stressed and sensationalized the relationship between him and Nancy Johnson Counts (App. p. 16); (d) his trial took place in a relatively small community and was the target of a relentless barrage of publicity (App. p. 16); (e) there were repeated references to the death of his daughter which warranted a change of venue (App. p. 16). Petitioner concludes by charging his guilt was not determined solely from the evidence; the publicity about his daughter was extremely prejudicial; the jurors could not be expected to erase this; and that he has demonstrated the prejudicial nature of the publicity involved. These arguments, while long on assertions, are short on specifics. A resume of the news publicity which is a part of the record shows why this is so. (References to the Winston-Salem *Journal*, the Winston-Salem *Sentinel*, and the Sunday *Journal* and *Sentinel* are made by use of the letters "J", "S", and "J and S" respectively.)

Week 1: Aug. 17, 1965 - Aug. 23, 1965

During this week, the news articles were long to medium in length. They reported the death of Mrs. Porth and the discovery

of her body, and noted that violence and murder were suspected (S Aug. 17; J Aug. 18). On Thursday, S reported the investigation progress, quoted officers as saying "We are just looking for a place to begin"; reported that the Porth's daughter had died a few years previously; and noted that Mrs. Porth's body would be checked for toxins. On Friday, J had a personal article on Mrs. Porth who had been active in civic work in the community. A second article reported investigative steps and mentioned the toxin check. The Friday S reported the autopsy was complete, and reported on Mrs. Porth's civic involvement. The Saturday J reported there was "No new information". The Saturday S reported the memorial services for the victim, that officers were still "probing", that false leads had been run down, and repeated the autopsy. The Sunday J and S noted the investigation was continuing and reported on the memorial service. The Monday S reported that Virginia officers had returned to Winston-Salem for interviews.

The news stories above show that Mrs. Porth was a substantial member of the Winston-Salem, North Carolina, community, and that she had been found dead on a mountain road in Virginia and that her car was missing. This engendered the continuous nature of the publicity. However, as virtually no facts were known, the reporting discloses little about the crime and focused mostly on investigative efforts. Petitioner was scarcely mentioned.

Week 2: Aug. 24, 1965 - Aug. 30, 1965

During this week, the articles were of medium and short length. Tuesday's J reported the officers were still looking for the car Mrs. Porth had driven. The Wednesday J reported that an interview with a Radford, Virginia, waitress, who had reportedly seen Mrs. Porth, along with the statement that this was discounted by the police. On Wednesday, S reported, in the week's shortest article, that petitioner was "questioned", and that Mrs. Porth's car was still missing. Thursday's S reported a continuing aerial search for the car, and that the FBI was not in the case. The same article, as almost all others, routinely reported the facts of Mrs. Porth's trip, that she was found dead and apparently robbed, and the results of the preliminary autopsy. The Friday J reported that the autopsy toxin report was negative, that Mrs. Porth was not expected by the relatives she had reportedly left to visit, and that the findings of death 24 hours before discovery and Mrs. Porth's reported departure

at 9:30 the night before her body was discovered at 7 30 in the following p.m. were not consistent. The Saturday S noted an investigation lull; that leads were "slim"; that the "hitchhiker" theory was being downgraded and the investigation was concentrated in the Winston-Salem community. No news appears from Sunday or Monday newspapers.

It again appears that the reporting followed the investigation's progress. It was noted that petitioner was questioned–not an uncommon or suspicious occurrence. The focus on Winston-Salem could point no more to petitioner's guilt than any other citizen residing in that town, in the minds of the readers of the news In retrospect, only the revelation that Mrs Porth was not expected at her destination might seem suspicious

Week 3: Aug. 31, 1965 - Sept. 6, 1965

The Tuesday J contained a small article stating no new developments had occurred, and that unnamed friends of the victim had been questioned. The Tuesday S reported that investigators were looking for Nancy Johnson, a former neighbor now believed in Florida. A large article appeared in the Wednesday S, reporting Mrs. Porth's past arsenic poisoning from insecticides, her daughter's death from an illness possibly triggered either by arsenic or mononucleosis as had been previously mentioned. The article noted a possible exhumation of the body, and that the search continued for Nancy Johnson. The Thursday J again reported that officers were seeking Nancy Johnson, as did the Thursday S, which reported the "hitchhiker" theory was being abandoned by the police. Both the J and S on Friday again reported that Nancy Johnson was being sought for questioning. Nothing appeared on Saturday. The Sunday J and S included a lengthy resume of the entire case. Of relevance to petitioner's claims, that article noted only that an "angle" existed in the death of the daughter, and that petitioner had been questioned at length. On Monday, the S reported as a bulletin that petitioner's lawyers said a "break" in the case was imminent.

Once again, the press largely confined its reports to the investigative progress. Mention of petitioner's being questioned, his daughter having been poisoned, and the search for a neighbor did appear, but these were presented undramatically and without insinuation.

Week 4: September 7, 1965 - Sept. 13, 1965

On Tuesday, September 7, 1965, the J headlined that petitioner had been charged with his wife's murder. Part of the story is missing, but that which was submitted recounts only the same innocuous recap which was the mainstay of prior stories. It concluded by noting the Florida investigation was complete, an interview with petitioner had been held, and this was followed by his being charged with the offense. A separate article was sympathetic with petitioner–its headline was "Son Says Porth Innocent". A picture showed curiosity seekers around Porth's new home, which was under construction, accompanied by an article reporting that the victim's car had been found; there had been no confession; and that it had been rumored that the victim had been murdered at the new home, which caused curiosity seekers and thieves to flock around the site. On Wednesday, the house was described as unusual–a "medieval castle", and it was noted that petitioner's other home had not been the subject of mass visitations. The same article reported that the sheriff would give "no news releases except those authorized by Booker" (petitioner's lawyer). There was also a feature story on the victim's past trip, years before, to the South Seas, about which she had given an interview to the local papers approximately 3 years before. It was accompanied by a photo of her own handwritten definition of the word "Aloha". Another article reported the finding of the car. The S headlined that petitioner would plead not guilty; stated that Nancy Johnson was not implicated in the case, and that "Sheriff Stone has been mum about the case since the arrest and has apparently agreed to give out no information until it is cleared with the defense". A separate article reported that petitioner had pleaded not guilty at the preliminary hearing, which it described as "quick and quiet", and contained a factual background report. A rumor that a private prosecutor would be hired was said to be untrue. The defense attorney, Booker, was reported as stating that the case was "discussed" so widely that a fair trial was impossible. A picture of the long-sought automobile being inspected was also shown. The Wednesday J reported hundreds of curiosity seekers viewing the new home of petitioner and the victim, that the regular home was undisturbed by these people, and that items at the construction site of the new home were being safeguarded from thieves. The article also described Porth's reputation as "friendly" and civic minded. A picture of the victim's car also appeared. An article entitled

"Brother of Victim Shocked at Charge" also appeared, in which the victim's brother stated he "Just can't believe his sister was killed by her husband." He was further quoted as saying "It must have been an accident", and that if petitioner were convicted "he will do anything he can to save Porth's life." Another article appeared describing why detection of the missing car took so long. Another article–a "human interest story"–described petitioner's interest in plants, his new house, and further described him as a "man of many abilities", concluding by reporting his spirits were better due to visits by friends. A longer article, accompanied by a picture of petitioner, stated he would plead not guilty, that the sheriff made no comment and would not unless it was cleared with petitioner's attorney It recounted the investigation, but added "It is understood that Mrs. Johnson provided information that is an important part of the police case against Porth". Petitioner's attorney was quoted as charging "prosecution" by the press, that petitioner "cannot get a fair trial here", and that the press had not pictured petitioner as deserving "sympathy and respect". The Wednesday S reported that petitioner himself had asked for the conference which resulted in his arrest, that the information was volunteered and resulted in finding the missing car. It repeated his relative's disbelief of petitioner's criminality. Thursday's J reported that the brother of the victim would not hire a private prosecutor, and that Nancy Johnson would be a state's witness. Her evidence was not revealed. It also noted the sheriff would say nothing, and that Booker had "quit talking", and that therefore there was no new information except that petitioner had sought the conference which led to his arrest. A picture of the arraignment was included. The Thursday S showed a photograph of the warrant, headlined the "innocent plea", reported on the arraignment, dress, and the procedures at the preliminary hearing. It reported the officers refused to state what was said at the conference which led to petitioner's arrest The contents of the warrant were set out, and the press noted that no weapon was specified, stated the police did not know what weapon was used, and that there were "rumors" of death by strangulation. The Friday J noted that petitioner's trial might occur in the near future. The Friday S headlined "Porth Death 'Accident' Mrs. Johnson Believes". The article gave her local background, contained her assertion that she was not implicated, and quoted her as saying petitioner had told her it was an accident and she believed him. The Saturday J repeated the above, noted petitioner's statement had not been described as a confession, and repeated petitioner's

brother-in-law's statement that it "must have been an accident". Saturday's S explained the mechanics of seeking an indictment, and noted the solicitor was not ready to try the case. The Monday S reported the grand jury had indicted petitioner.

From the above, it appears that in the fourth week, petitioner was first tied to the crime by his own voluntary conference which led to his arrest. The reporting then followed the technical steps from arrest to indictment, and reported other developments. No evidence against petitioner was given out by the press, and it alluded to unspecified evidence only once (that of Nancy Johnson). The sheriff refused to make statements to the press, articles sympathetic to petitioner abounded–from his son, his brother-in-law, his ex-neighbor. The "accidental death" defense was floated out for public consumption. Petitioner was presented as "a man of many abilities", a victim of hate callers, curiosity seekers and thieves. It was made known that petitioner's statement was not a confession, and that he would and did plead not guilty. A rumor about private prosecution was laid to rest, a rumor of death by suffocation was circulated. His lawyer obtained publication of completely unwarranted charges of "prosecution" by the press, and charged the lack of sympathy for his client, completely ignoring the quantity of news which was of the *genre*. Petitioner's attorney also asserted that discussion of the "case" prevented a fair trial although the press gave none of the "case" beyond the fact of death and arrest to its readers.

Week 5: Sept. 14, 1965 - Sept. 20, 1965

In this week, only three short articles appeared. One reported the indictment on Monday; the next two reported a continuance of the case. In the Wednesday J, a letter to the editor attacked the community's ("our") response to the events as unchristian and chided it to remember the presumption of innocence.

Week 6: September 21, 1965 - Sept. 27, 1965

The Tuesday J reported in a brief article that petitioner had had a medical examination for dizziness. The Wednesday S and Thursday J reported that the solicitor would oppose a change of venue, and the Thursday S quoted him as doubting a motion would be made. Friday's J quoted the solicitor as saying petitioner could get a fair trial in Winston-Salem.

Week 7: Sept. 28, 1965 - Oct. 4, 1965

No news appears in this week except an article saying the solicitor would need another continuance.

Week 8: Oct. 5, 1965 - Oct. 11, 1965

During this week, a Tuesday J article of short length reported the case would be tried in November at the earliest. On the Monday following, the S reported that petitioner would move for a change of venue or a special venire.

Week 9: Oct. 12, 1965 - Oct. 18, 1965

On Tuesday, the J reported that the motion for a change of venue would be made.

Week 10: Oct. 19, 1965 - Oct. 25, 1965

On Tuesday, the J, in a long article, reported that the solicitor would seek an exhumation of the bodies of Mrs. Porth and the Porth's deceased daughter. The solicitor had not announced this, but the story broke in Milwaukee, Wisconsin, where the district attorney of that city made the necessary motion on behalf of the State of North Carolina. The legal problems involved were set out in the article. The solicitor's request, evidently made by letter, was quoted as having stated that a later conference with the physician who made the autopsy resulted in that physician noticing other marks on the body. It quoted petitioner's defense as being accidental fall, but stated that the examiner believed that the victim had been severely beaten. It noted that the state's information "was incomplete". This article is not complete as it appears in the record. On October 20, the solicitor was reported as surprised at the publication of his letter, and the exhumation request was reported as acceptable to petitioner's brother-in-law. Neither article is complete as it appears in the record. Both the S and the J reported on October 23 and 24 that the State of Virginia was joining the request for exhumation.

The foregoing articles again thrust petitioner's case into the public eye. However, once again, no evidence against petitioner was reported by the press. The publicity was engendered by the

Week 7: Sept. 28, 1965 - Oct. 4, 1965

No news appears in this week except an article saying the solicitor would need another continuance.

Week 8: Oct. 5, 1965 - Oct. 11, 1965

During this week, a Tuesday J article of short length reported the case would be tried in November at the earliest. On the Monday following, the S reported that petitioner would move for a change of venue or a special venire.

Week 9: Oct. 12, 1965 - Oct. 18, 1965

On Tuesday, the J reported that the motion for a change of venue would be made.

Week 10: Oct. 19, 1965 - Oct. 25, 1965

On Tuesday, the J, in a long article, reported that the solicitor would seek an exhumation of the bodies of Mrs. Porth and the Porth's deceased daughter. The solicitor had not announced this, but the story broke in Milwaukee, Wisconsin, where the district attorney of that city made the necessary motion on behalf of the State of North Carolina. The legal problems involved were set out in the article. The solicitor's request, evidently made by letter, was quoted as having stated that a later conference with the physician who made the autopsy resulted in that physician noticing other marks on the body. It quoted petitioner's defense as being accidental fall, but stated that the examiner believed that the victim had been severely beaten. It noted that the state's information "was incomplete". This article is not complete as it appears in the record. On October 20, the solicitor was reported as surprised at the publication of his letter, and the exhumation request was reported as acceptable to petitioner's brother-in-law. Neither article is complete as it appears in the record. Both the S and the J reported on October 23 and 24 that the State of Virginia was joining the request for exhumation.

The foregoing articles again thrust petitioner's case into the public eye. However, once again, no evidence against petitioner was reported by the press. The publicity was engendered by the

"incomplete" nature of the case against petitioner, rather than the strength of the state's case. The information with regard to his daughter's death was sought in order to determine whether or not she had been poisoned intentionally or by mistake. None of these charged petitioner with any new act, nor did they indicate any belief that petitioner had killed his daughter or, that he had done so intentionally.

Week 11: Oct. 26, 1965 - Oct. 31, 1965

The Tuesday J reported the legal skirmishes surrounding the request for exhumation and reported the state desired to determine whether petitioner's daughter was poisoned intentionally or by a mistake. The Saturday S noted that petitioner intended to move for a bill of particulars.

Week 12: Nov. 1, 1965 - Nov. 7, 1965

The Tuesday S and Wednesday J each reported two stories concerning the motion for a bill of particulars. Of relevance to petitioner's claim, the solicitor made known in court that the exhumation had been caused by a "voluntary unsolicited statement that (petitioner) would straighten the arsenic cases out later", and admitted that any evidence arising from the exhumation would be limited.

Week 13: Nov. 8, 1965 - Nov. 14, 1965

No news from this week is contained in the record.

Week 14: Nov. 15, 1965 - Nov. 21, 1965

The Thursday S reported a resumption of the hearing on the bill of particulars was scheduled for the following day. The Saturday S reported that the motion had been denied.

Week 15: Nov. 22, 1965 - Nov. 29, 1965

No news from this week is contained in the record.

Week 16: Nov. 30, 1965 - Dec. 6, 1965

No news from this week is contained in the record.

Week 17: Dec. 7, 1965 - Dec. 13, 1965

No news from this week is contained in the record.

Week 18: Dec. 14, 1965 - Dec. 20, 1965

The Friday S reported the filing of Mrs. Porth's will. The Monday S reported that the exhumation hearing would be held in Milwaukee the following day.

Week 19: Dec. 21, 1965 - Dec. 27, 1965

The Tuesday J reported the exhumation hearing was to be held that day in Milwaukee, and the S reported that the hearing had been postponed. The Thursday S reported that the motion for the bill of particulars had been denied. On Friday, both the J and S reported the filing of Mrs. Porth's will.

Week 20: Dec. 28, 1965 - Jan. 3, 1966

No news from this week is contained in the record.

Week 21: Jan. 4, 1966 - Jan. 10, 1966

The Wednesday J reported Booker as saying the judge who denied his motion for a bill of particulars violated petitioner's rights by the order. An undated article reported a conference of Virginia medical officers in preparation for the exhumation hearing. On Monday, the S reported that witness Nancy Johnson was filing for divorce against her husband.

Week 22: Jan. 11, 1966 - Jan. 17, 1966

On Monday, the S reported that each side was traveling to Milwaukee for the exhumation hearing.

Week 23: Jan. 18, 1966 - Jan. 24, 1966

On Tuesday, the J reported that the hearing was set for that day. Another article appeared with Mrs. Porth's name in the head; however, only that part of the article is contained in the record. Neither article reported that Kathy Porth's exhumation was to

determine whether or not she was poisoned. On Thursday, the J carried a picture of workmen exhuming the bodies, and a medium length article reporting mainly the mechanics of the hearing. The article noted the autopsy on Mrs. Porth had been incomplete, and that Kathy Porth's body was wanted in order to determine if she was poisoned. The Friday S and the Saturday J reported that suffocation was not the cause of death as had been previously rumored by an article reported in the September 9 J. The article also reported Mrs. Porth's estate at about $15,000. A separate article gave a fuller account of her estate. The Monday S, in a short article, reported the birth of a child to Nancy Johnson, who had been long separated from her husband.

Week 24: Jan. 25, 1966 - Jan. 31, 1966

The Tuesday J reported the birth of a child to Nancy Johnson in a short article. The Tuesday S reported that the poison tests on the body would be made in Virginia. There also appears undated the bottom part of a letter to the editor charging the paper with insinuating the baby was tied to the case.

Week 25: Feb. 1, 1966 - Feb. 7, 1966

No news appears in the record for this week.

Week 26: Feb. 8, 1966 - Feb. 15, 1966

No news appears in the record for this week.

From the foregoing review of the articles which are a part of the record, the following can be said of petitioner's contentions. (a) It is true that publicity continued throughout the period from crime to trial, although it was not incessant in nature; and it is true that petitioner was denied a change in venue; however, the reporting during this period tended to follow the mechanical aspects of the case, was factual in nature, and after the fifth week, and long before the trial months later, reporting became intermittent. (b) Reference was made to the unusual circumstances of the death of the victim; however, no attempt was made by the press to hold petitioner responsible for the death; nor did the press ever give any intimation concerning Kathy Porth's death, but described it only as the police angle, and always reported that whether or not she

was poisoned was the matter to be discovered, and if so, whether it was accidental or on purpose. With regard to this matter at trial, Nancy Johnson, as a part of the state's case, placed the time of the liaison between her and petitioner after Kathy Porth's death (Tr p 533), and testified that petitioner and his daughter were close (Tr p 618). (c) The publicity was not inflammatory and did not "sensationalize" his wife's death. Reporting was almost always factual, and never beyond the quantum dictated by the investigative events and Mrs. Porth's stature in the community. Those parts which were subjective in nature tended to be sympathetic to petitioner, e.g., his relatives and friends' supporting comments, letters to the editor on his behalf, assertions (unfounded) of unfairness by his lawyer, personal affronts to him from hate mail, curiosity seekers and thieves. Three rumors on the case were reported, but two were later ruled out. The third concerned the location of the place where the death occurred which was hardly an inflammatory matter. No state's evidence concerning anything other than the fact of death was ever presented by the papers except for the fact that a statement had been given by petitioner, and that he had volunteered a statement on arsenic. The last of these occurred three months before trial. Moreover, the press spread the idea of the defense of "accident" which had been proffered by petitioner's friends and relatives. The press never insinuated petitioner was responsible for the death of his daughter, and no relationship between him and Nancy Johnson was ever intimated by the press, which described her only as a former neighbor and a state's witness. Other than short and limited reporting on the birth of her child, she had scarcely been mentioned in the press since November. Moreover, with regard to the birth of her youngest child, Nancy Johnson at trial indicated that she did not know who the father of the child was (Tr p 582, 621). (d) Petitioner's trial took place in Winston-Salem, North Carolina, then the State's second largest city having a population of well over 100,000 persons within the city itself, not including the county from which jurors were also drawn. There was no publicity in the nature of a "barrage" nor was publicity "relentless". (e) There were repeated references to the death of petitioner's daughter; however, none ever ascribed the death of his daughter to petitioner, nor were any of the articles of unusual length or primary focus. Like other aspects of petitioner's case, this matter was reported only when timely.

Applying the law to the set of facts outlined above, it is

apparent petitioner's trial was not affected by the above publicity. As noted before, it was appropriate in amount, factual in nature, and often sympathetic to petitioner. It was intermittent during the nearly four months between arrest and trial. The rule is that where prejudicial publicity exists, it does not disqualify jurors who have heard it if they can lay it aside in reaching a verdict, *U.S. v. Milanovich*, 303 F. 2d 626 (4th Cir. 1962). Here, the publicity was not even prejudicial. In order for petitioner to obtain relief he must show that the accounts must have so prejudiced him in the eyes of the community that a fair trial was necessarily prevented, *Stroble v. California*, 343 U.S. 181 (1952). In this case, however, the accounts, by their facts and comments, were not damaging to petitioner. In the balance on this matter are also the facts that on the hearing for a change of venue, the state produced 25 affidavits and four witnesses that a fair trial could be had in Forsyth County; no continuance was sought by petitioner; peremptory challenges were not exhausted by him; each juror had no opinion on the guilt or innocence of the petitioner; and the jurors were sequestered daily throughout the trial. Because of the foregoing, certiorari should not be issued to review this matter.

ARGUMENT III

EVIDENCE AGAINST PETITIONER WAS NOT PROCURED BY DURESS, AND PETITIONER'S SHOWING IN THIS REGARD IS INSUFFICIENT TO MERIT HIM RELIEF IN A FEDERAL HABEAS CORPUS PROCEEDING.

Petitioner's next contention is that he was denied a fair trial because the state's primary witness testified out of fear of being arrested, has repudiated her testimony, and under state law, he is therefore entitled to a new trial. These allegations merit him no relief.

The last of these arguments is not properly before the Court. Habeas corpus exists for the vindication of federal and not state rights, *Johnson v. Zerbst*, 304 U.S. 458 (1937), *Fay v. Noia*, 372 U.S. 391 (1963). Any right to a new trial petitioner may have under state law must be vindicated by the state, and not the federal courts. Parenthetically, respondent, in its review of petitioner's massive file, has not discovered a motion for a new trial on the basis of the evidence proffered.

The second of these arguments is likewise not properly before the Court. Repudiation of testimony goes to the merits of guilt or innocence, not the constitutionality of state action in conducting an investigation or trial. Habeas corpus exists only to challenge custody obtained in violation of the Constitution or laws of the United States, 28 U.S.C. 2254, not custody incorrectly obtained bacause a jury did not accurately gauge the credibility of a witness, *U.S. v. Shipp*, 409 F. 2d 33 (4th Cir. 1969).

With regard to the first of petitioner's allegations, an affidavit (Appendix II, to this response) signed by Nancy Johnson Counts and dated August 21, 1966, was made a part of the post-conviction proceedings in state court. Mrs. Counts did not appear personally, having moved to Australia (PCH Tp 40,41). A Nancy Johnson was a primary witness for the state (Tr Tp 494-637), and her testimony supplied two incriminating statements (Tr Tp 547, 548), and a motive against petitioner. However, motive was also supplied by statements petitioner made to the sheriff. (Tr Tp 460, 467). After the time of the trial on February 19, 1966, Nancy Johnson evidently married defense witness John Counts, with whom she had lived in Florida, and who testified at trial that he desired to marry her (Tr Tp 1075).

The affidavit recites (a) that Mrs. Counts has "facts that proved Mr. Counts has lied at trial"; (b) that when she testified she was either under hypnosis or shock but a "bad blow" had brought her out of it and she now remembered "things" which happened prior to the birth of her child, and remembered viewing the pictures of Mrs. Porth's body; (c) that she was in fear of being placed under arrest when she testified; and (d) she knew no facts which indicated that petitioner is guilty of first degree murder.

As a whole, her affidavit is scarcely literate, and is so confused, conclusory and incredible as to necessitate no further proceedings because of it. As for her allegation concerning Counts' lying, his testimony corroborated her's at trial, and was described as harmless by defense counsel (PCH Tp 86, 87). With regard to any hypnosis or shock under which influence she may have been, it was obviously unapparent not only to the jury, but to defense counsel, as he made no inquiry into the matter. Additionally, a review of Mrs. Johnson's testimony at trial showed that other than the remembrance of certain particular dates, her testimony was lucid. The "things" now supposedly remembered are unspecified in the affidavit, and it is

hard to imagine' what more beyond her testimony she might bring forth now. The reference to remembering having viewed the pictures of Mrs. Porth's body is strange, as she testified to having viewed them at trial (Tr Tp 592, 594). Mrs. Johnson's fear of arrest is not specified. She, herself, brought out at trial that it was a possibility (Tr Tp 587), and the jury had this before it for its aid in gauging her testimony. However, at trial she also testified that her testimony was the truth despite this factor, and further acknowledged that she had been informed that she was not required to make any statement to the police (Tr Tp 620). At petitioner's post-conviction hearing, contrary hearsay was introduced (PCH Tp 107). However, the state also produced evidence that no charges involving murder were held over her (PCH Tp 155), and threats by the investigating officers were denied (PCH Tp 153). It appears some warrants against her may have been held by officers from another city; however, these involved only motel registration under a false name (PCH Tp 143), a petty offense and one which could not conceivably deter a witness from testifying favorably to her paramour where his life was at stake. Finally, Mrs. Counts' lack of knowledge of "any facts (indicating petitioner) is guilty of first degree murder" is likewise further unexplained in the affidavit. This was denominated as conclusory at the state post-conviction hearing (PCH Tp 126), and it was properly noted by the District Court that this fails to amount to a repudiation (Order p 6, Application for Certiorari, PA 6). Taking the affidavit as a whole, including those parts most relevant to petitioner's allegation that her testimony was obtained under duress, it is apparent that the affidavit is insufficient to merit further inquiry into the matter and that certiorari should not issue to review it.

ARGUMENT IV

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER.

Petitioner next contends his rights were violated by the admission of testimony concerning the death of his daughter. The North Carolina Supreme Court dealt with this in the following manner on petitioner's appeal

"One of the assignments of error involved a question addressed to William Porth, son of, and witness for, the defendant. He had testified that he came home from Alaska for his sister's funeral in 1972. The solicitor's question was 'Don't you know for a fact that your sister died from arsenic poisoning?' Answer. 'No, sir, I don't.' He was asked whether the family did not discuss arsenic poisoning. He said arsenic was never mentioned. The question and the answer were admitted over the defendant's objection. As bearing on the objection it should be remembered that the defendant first brought up the 'arsenic deal' as one of the skeletons in his closet. This was one of the reasons he assigned for his panic and his realization no one would believe that is wife had been killed by the fall down the steps. Nancy Johnson had quoted the defendant as saying Mrs. Porth was in the hospital because of arsenic poisoning. These clues alone were sufficient to justify the solicitor's efforts to find out if an attempt had been made to take Mrs. Porth's life by poisoning. Such efforts, if attributable to the defendant, would have obvious bearing on the question of premedtation, *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769; *certiorari* denied, 368 U.S. 851. However, the solicitor's effort to show by cross-examination of William Porth that his sister died as a result of arsenic poisoning was not warranted. The court should have sustained the objection. There was nothing to show the daughter, at the time of her death, was a member of the defendant's household, or that by mistake she took arsenic poisoning which the defendant had intended for Mrs. Porth.

"Absent a showing that the death of witness Porth's sister was caused by arsenic poisoning which was intended, not for her, but for her mother, the inquiry into the cause of the sister's death would appear to be improper as introducing evidence of a separate and independent crime. The rule, and the exceptions with respect to such evidence are fully discussed in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 The question may be debatable whether the evidence of

> the sister's death by poisoning is governed by the general rule and should be excluded, or by the exceptions, and should be admitted. But assuming the question was improper, nevertheless, the answer was exculpatory and rendered the inquiry harmless." 269 N.C. at 338, 339; 153 S.E. 2d at 17, 18 (1966)

From the above, it is obvious that this evidentiary matter violated neither a specific constitutional provision nor any concept of fundamental fairness as is required for habeas corpus relief in the context of petitioner's assertion, *Grundler v. North Carolina*, 283 F. 2d 798 (4th Cir. 1960), and that the same result would have occurred in an appeal of the matter within the federal court system, *Sidders v. U.S.*, 381 F. 2d 513 (9th Cir. 1967). Accordingly, certiorari should not issue to review this matter.

ARGUMENT V

PETITIONER WAS NOT REQUIRED TO UNCONSTITUTIONALLY ASSUME THE BURDEN OF PROOF.

Petitioner further contends that autopsy evidence was improperly admitted because the state failed to show the handling of the body during the 5-month interim between death and autopsy. Therefore the possibility of mishandling during shipment and interment was not negated and the jury could not fairly judge the testimony concerning the autopsy, unless petitioner showed that mishandling was the case. He argues this amounts to an unconstitutional shift in the burden of proof.

This contention is frivolous. The burden of proof which may not be shifted is that concerning the ultimate issue of guilt or innocence. This, however, does not require the state to nail down every conceivable loose end as prerequisite to having the jury pass upon its case; nor does it prohibit the state from presenting a case which will convict only if unrefuted, *Virgin Islands v. Lake*, 362 F. 2d 770 (3rd Cir. 1966), *Virgin Islands v. Torres*, 161 F. Supp. 699 (DC VI 1958). Accordingly, certiorari should not issue to review this matter.

ARGUMENT VI

PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS WAS PROPERLY REVIEWED.

Petitioner lastly contends he is entitled to a hearing *de novo* under *Townsend v. Sain*, 377 U.S. 293 (1963) despite his state court hearing. He gives two reasons: (a) the state court "failed to take into full account the full impact of the pretrial publicity"; and (b) a substantial allegation of newly discovered evidence. Neither merits him a hearing. The federal courts below fully reviewed both matters on the record submitted to them, and independently applied federal standards to the evidence and factual findings relating to them. Nothing more was required, *Fay v. Noia*, 322 U.S. 391 (1963), and certiorari should not issue to review this matter.

CONCLUSION

From the foregoing arguments and authorities, it conclusively appears that petitioner has brought no matter to this Court's attention which would justify its further consideration of his case. He has wholly failed to show either legal wrong amounting to an infringement of his constitutional rights, or any damage to him arising out of same. Accordingly, his application for writ of habeas corpus was properly denied by the District Court; his appeal was properly dismissed by the Court of Appeals; and certiorari should not issue from this Honorable Court to further review petitioner's case.

This day of September, 1973.

Respectfully submitted,

ROBERT MORGAN
Attorney General
of North Carolina

RICHARD N. LEAGUE
Assistant Attorney General

Counsel for Respondent

Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 829-7188

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief on Petitioner by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to Petitioner at 835 West Morgan Street, Raleigh, North Carolina 27603, on the day of October, 1973.

Richard N. League
Assistant Attorney General

APPENDIX I

UNITED STATES COURT OF APPEALS
Fourth Circuit

January 6, 1972

Samuel W. Phillips
Clerk

Telephone 643-5592
Area Code 703
Tenth and Main Streets
Richmond, Virginia 23219

RE: No. 72-1012, Robert E. Porth, v. Warden of the State Penitentiary of the State of North Carolina (C-300-G-70)

TO: Robert E. Porth
835 West Morgan Street
Raleigh, N.C. 27603

Hon. Jacob L. Safron
Assistant Attorney General
N. C. Dept. of Justice
P. O. Box 629
Raleigh, N.C. 27602

Info copy

Fred G. Crumpler, Jr., Esq.
Winston-Salem, N.C. 27101

The record on appeal has been received in this office.

You are each granted 20 days from the date of this memorandum to state why the judgment of the district court should be reversed or upheld. Your statements need not be in technical legal form. A simple explanation of the merits of the appeal will be sufficient.

Even if you do not file such a statement, the Court will carefully consider the merits of the appeal and will not rule against you merely because no statement was filed.

After the expiration of 20 days, the record and any statements filed will be submitted to a panel of the Court who, upon consideration of the merits of the appeal, may take the following action:

(1) Summarily dismiss the appeal, affirm, or reverse the judgment of the district court without appointment of counsel, full briefing and oral argument, or

(2) Appoint counsel (if a party is indigent and without counsel), direct that briefs be submitted and dispose of the appeal upon the briefs or oral argument.

For the convenience of parties not represented by counsel, there is enclosed a form which may be used in submitting the statement.

CLERK

APPENDIX II

State of Florida, County of Broward **Affidavit**

I, Nancy Johnson Counts, after first being duly sworn, depose and say; that I make the foregoing statement voluntarily and of my own free will without threat or fear or promise of remuneration and have voluntarily called Mr. Fred G. Crumpler, Attorney, of Winston-Salem, N. Carolina, and have requested the opportunity to make the foregoing statement.

I have facts that prove that Mr. Counts has lied, at the trial.

At the time I testified, I was either under hypnosis or in a state of shock, and the bad blow I received in Broward County 2 July 1966 brought me out of it. I remember clearly now the things that happened prior to the birth of my child and viewing the pictures of Mrs. Porth's body that I did before the blow.

At the time I testified, I was in fear of being placed under arrest.

Q. Mrs. Counts, at the present time, if you testify as to all facts within your knowledge concerning the death of Mrs. Porth, are there any facts whatever that indicate that Mr. Porth is guilty of first degree murder?

A. No.

Q. Will you volunteer to appear and testify to the facts you know if there is a trial?

A. Yes.

I have read the foregoing statements and they are true to my own knowledge, August 21, 1966.

Sworn to and subscribed before me this twenty-first day of August, nineteen sixty six.

/s/ Nancy Johnson Counts
Nancy Johnson Counts

/s/ (Name of notary illegible)
Notary Public
My commission expires
10-31-67

SEAL